IN THE

Supreme Court of The United States

OCTOBER TERM, 1938

No. 122

CHICOT COUNTY DRAINAGE DISTRICT ..... *Petitioner*

v.

THE BAXTER STATE BANK and
MRS. LENA S. SHIELDS ..... *Respondents*

RESPONSE TO PETITION FOR CERTIORARI

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Respondents, by their attorneys respectfully contend that the petition for certiorari should be denied for the following reasons:

(1) The issue presented is not of sufficient public interest or importance to bring it within the purview of Rule 38 of the rules of this Court.

(2) The Court below did not err in holding that the decree entered March 28, 1936, by the District Court was

not binding upon these respondents. The Act of Congress upon which it was based is unconstitutional. The Court had not power to issue process against these respondents. They did not appear either in person or by attorney. They were not before the Court either actually or constructively.

(3) Petitioner now presents to this Court theories, arguments and decisions that were not presented to nor considered by the Courts below.

WHEREFORE, respondents respectfully pray that the petition be denied.

THE BAXTER STATE BANK and
MRS. LENA S. SHIELDS,

By.....

ARTHUR J. JOHNSON,
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G. W. HENDRICKS,
Little Rock, Arkansas,
Attorneys for Respondents.

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BRIEF AND ARGUMENT

Respondents present the different points advanced in the order in which they appear in their response.

I.

THE ISSUE PRESENTED IS NOT OF SUFFICIENT PUBLIC INTEREST OR IMPORTANCE TO BRING IT WITHIN THE PURVIEW OF RULE 38 OF THE RULES OF THIS COURT.

Paragraph 5 of Rule 38 of this Court is as follows:

"A review on writ of certiorari is not a matter of

right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." • • •

This Court will grant the writ: (1) To secure uniformity; (2) to consider questions of importance to the public.

Petitioner alleges the issue decided against it below is important, but its importance to the public does not appear. Its interest is to reverse, if possible, the judgment below and discharge its obligations by paying a part of the amount due. Respondents are interested in being able to realize in full on contracts purchased in good faith. These parties only are interested.

Petitioner states that during the time between the passage of the first Municipal Bankruptcy Act and the date it was declared unconstitutional "there were undoubtedly a great number of cases instituted by improvement districts for the purpose of effecting a composition of debt." This is based only upon speculation and conjecture.

When a sufficient number of creditors had signed to make the alleged Act apparently operative and other parties, though not consenting in the beginning, then came in and surrendered their bonds, not one of them at this time may be affected by this decision. Since all parties ultimately consented to discount their bonds, it became a matter of contract and could have been fully consummated without any act of congress.

The only ground upon which petitioner seeks to invoke

the power of this Court to grant certiorari is that of public interest. As a basis for this Court's jurisdiction it cites three cases on Page 5 of its petition. In *National Labor Relations Bd.* v. *Mackay Radio & Teleg. Co.*, 304 U. S. 333, 58 S. Ct. 904, 82 L. Ed. 1381, this Court granted certiorari on the ground of conflict in decisions. This is true in *Gay* v. *Ruff*, 292 U. S. 25, 30; 78 L. Ed. 1098, 1104 (1933). From the other case cited by petitioner, *Magnum Import Co.* v. *Coty*, 262 U. S. 159; 43 S. Ct. 531, 67 L. Ed. 922, we quote as follows:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two reasons: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing." • • •

II.

THE COURT DID NOT ERR IN HOLDING THAT RESPONDENTS WERE NOT BOUND BY AN UNCONSTITUTIONAL ACT.

The decision by the Circuit Court of Appeals appears Record 97. Authorities cited clearly support it.

Petitioner argues that respondents should have raised the question of the constitutionality of the Act, and failing to do so, then failing to appeal, are bound by the decree.

They were not in court in person nor by attorney (R. 98). There was no duty to respond to process issued under an unconstitutional Act. They were not in court, actually or constructively.

The unconstitutional Act was a nullity. *C. I. & L. R. Co.* v. *Hackett*, 228 U. S. 557.

From 11 American Jurisprudence (Constitutional Law, sub-head, "Effect of Unconstitutional Statutes," sec. 148), we quote:

> "Since unconstitutional law is void, the general principles follow that it imposes no duties, confers no rights, creates no office, bestows no power or authority on anyone, affords no protection, and justifies no acts performed under it. No one is bound to obey an unconstitutional law and no courts are bound to enforce it because only the valid legislative intent becomes the law to be enforced by the courts."

III.

PETITIONER PRESENTS THEORIES, ARGUMENTS AND DECISIONS THAT WERE NOT PRESENTED TO NOR CONSIDERED BY THE COURTS BELOW.

The suggestion that had the Ashton case been appealed from Arkansas the decision may have been different is very far-fetched and highly speculative, an after-thought on the part of petitioner—a theory not presented to the District Court nor to the Court of Appeals, and none of

the cases cited by petitioner was cited in its brief in the Court of Appeals.

It is not anticipated that this Court at this time will review the Ashton case with a view of deciding whether the first Municipal Bankruptcy Act unauthorized by the Constitution of the United States as applied to other States might be constitutional in the State of Arkansas.

It is respectfully submitted that the petition should be denied.

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